83-405

No.

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In the Supreme Court of the United States

October Term, 1983

In the Matter of the Estate of Sarah R. Reed, Deceased.

INDIANA UNIVERSITY FOUNDATION AND PAULINE WINNICK,
Appellants,

vs.

GEORGE ANDREW REED, MARGARET MOORE, MARIE SIEDSCHLAG, DOROTHY SCHWAB, AND VIOLA REED SIMISON,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the full faith and credit provision of Article IV, Section 1 of the Constitution of the United States or the provisions of K.S.A. 59-2229 and 59-2230 (prior to amendment in 1982) as applied under full faith and credit require that the status of the will of Sarah R. Reed, who died while domiciled in Kansas but whose will was made and executed in Indiana, be recognized in Kansas and the will admitted to probate in Kansas based upon its probate in Indiana where the will was determined to be properly executed under Indiana law?

LIST OF ALL PARTIES

APPELLANTS:

Indiana University Foundation (no affiliates or subsidiaries) except Allways Travel, Inc., an Indiana Corporation

Pauline Winnick

APPELLEES:

George Andrew Reed, Margaret Moore, Marie Siedschlag, Dorothy Schwab, and Viola Reed Simison, who are some of the alleged heirs at law of Sarah R. Reed

Ruth C. Schillinger, Administrator of the Estate of Sarah R. Reed (Appellants have filed a notice under Rule 10.4 that this party has no interest in the outcome of the appeal)

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No.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas, from which appeal is made, is reported at 233 Kan. 531, 664 P.2d 824 (1983), and appended as Appendix A. The opinion of the District Court of Lyon County, Kansas, which was reviewed by the Supreme Court of the State of Kansas, is appended as Appendix B. The opinion of the Monroe Circuit Court of the State of Indiana which admitted the will of Sarah R. Reed to probate in Indiana is appended as Appendix C.

STATEMENT OF JURISDICTION

Indiana University Foundation and Pauline Winnick, Appellants, appeal from the judgment of the Supreme Court of the State of Kansas (Appendix A) which reversed the judgment of the District Court of Lyon County, Kansas (Appendix B), which had admitted the will of Sarah R. Reed to probate in Kansas based upon an order of the Monroe Circuit Court of the State of Indiana (Appendix C) admitting the will to probate in Indiana. The will had been made and executed in Indiana but Sarah R. Reed died which domiciled in Kansas.

After the will was admitted to probate in Indiana, Appellants petitioned in the District Court of Lyon County, Kansas, for the probate of the will in Kansas upon the basis of the full faith and credit provision of the Constitution of the United States as well as upon the provisions of K.S.A. 59-2229 and 59-2230 (prior to amendment in 1982) as applied under full faith and credit (these Kansas statutes provide that when a ". . . will has been duly proved and admitted to probate outside this state . . . then it shall be admitted to probate [in Kansas] . . . ."). Appellants' Amended Petition for Probate of Will Probated Elsewhere is appended as Appendix E.

The judgment of the District Court of Lyon County, Kansas, admitting the will to probate was made on March 17, 1982 (Appendix B). Appeal was duly filed by some of the alleged heirs at law and by the Administrator with the Court of Appeals of the State of Kansas, and the appeal was transferred to the Supreme Court of the State of Kansas by order of that Court on December 6, 1982 (Appendix F).

The judgment of the Supreme Court of the State of Kansas reversing the District Court was rendered on

June 10, 1983 (Appendix A). Appellants filed their Notice of Appeal with the Supreme Court of the State of Kansas on September 6, 1983, and filed a copy of the Notice of Appeal with the District Court of Lyon County, Kansas (the court possessed of the record), on September 2, 1983 (Appendix D).

In its judgment (page 539), the Supreme Court of the State of Kansas construed K.S.A. 59-2229 and 59-2230 (prior to amendment in 1982) to apply only to non-residents of Kansas even though the Kansas legislature had made a choice of laws in those statutes for wills made and executed in other states and had chosen to apply the law of the state where the will was made and executed in determining whether or not the will was properly executed.[1] The result of the Court's judgment was an application of those statutes contrary to the full faith and credit provision of the Constitution of the United States.

Numerous cases in this Court beginning with *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878), and continuing through *Riley v. New York Trust Co.*, 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885 (1941), and *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), have honored the right of a state under full faith and credit, and whether by statute or court decree, to choose to apply the law of a foreign jurisdiction.

Also in that judgment (page 535), the Court restated a portion of its previous opinion regarding this will (229 Kan. 431, 625 P.2d 447 (1981)) where it had stated in dictum that the will was unsigned, although

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1. In the other two statutes of the Kansas Probate Code dealing with wills made and executed in a foreign jurisdiction, the Kansas legislature also chose the law of the foreign jurisdiction—K.S.A. 59-609 (Appendix G) and K.S.A. 59-806 (Appendix H).

no facts concerning the making or executing of the will were in the record before it either for the previous opinion or for the opinion here on appeal except for the authenticated findings of fact and conclusions of law made by the Indiana Court. The evidence concerning the making and executing of the will was taken only before the Indiana court and the issue of whether or not the will was signed was never before the Kansas courts. Both the Kansas statute applicable to the previous opinion, K.S.A. 59-609 (Appendix G), and the Kansas statutes applicable to the opinion here on appeal, K.S.A. 59-2229 and 59-2230 (prior to amendment in 1982), reserve that issue for determination under Indiana law. Nevertheless, the Kansas Court could not divorce itself from the idea that the will was not signed. At another point in its opinion (page 539), it stated that the Indiana Court had no jurisdiction to determine that the will was properly executed according to Kansas law, even though, as already noted, the issue of whether or not the will was properly executed under Kansas law was never before the Kansas courts, the Kansas statutes had made that issue a matter of Indiana law, and the Indiana Court had specifically ruled that the will was properly executed as a signed and attested will under Indiana law.

In its judgment (page 531), the Supreme Court of the State of Kansas also said that it did not have to recognize a foreign decree if the foreign decree violated public policy in Kansas. Although it did not expressly identify the public policy to which it referred, the implication from the opinion is that Kansas law requires wills made and executed in Kansas to be signed and that because the Court thought this will was unsigned, it was therefore contrary to Kansas public policy.

Having concluded that the will was not signed, the Court's implicit holding was that it did not have to recog-

nize the will of Sarah R. Reed as a signed and attested will under full faith and credit even though, after receiving evidence, the Indiana court had found the will to be a signed and attested will under Indiana law where the will had been made and executed.

Those cases of this Court cited above as well as others from this Court, all of which are cited in the leading Kansas case dealing with full faith and credit, *In re Estate of DeLano*, 181 Kan. 729, 315 P.2d 611 (1957), have all held that under full faith and credit when the status of a matter before a court with jurisdiction has been determined, then that status is binding on foreign courts. However, the status of the will of Sarah R. Reed as determined by the Indiana court as properly made and executed under the law of Indiana where the will was made and executed is the principal thing about the will which the Supreme Court of the State of Kansas refused to acknowledge in this case.

This Court has jurisdiction of this appeal under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISION AND KANSAS STATUTES INVOLVED

The constitutional provision involved in this case is the full faith and credit provision of Article IV, Section 1 of the Constitution of the United States, which provides as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, §1.

The Kansas statutes involved in this case are as follows:

> "When a copy of a will executed outside this state and the probate thereof, duly authenticated, shall be presented by the executor or any other person interested in the will, with a petition for the probate thereof, the court shall fix the time and place for the hearing of the petition, notice of which shall be given to such persons and in such manner as the court shall direct." K.S.A. 59-2229 (prior to amendment in 1982).

> "If, upon the hearing, it appears to the satisfaction of the court that the will has been duly proved and admitted to probate outside this state, and that it was executed according to the law of the place in which it was made, or in which the testator at the time resided or in conformity with the laws of this state, it shall be admitted to probate, which probate shall have the same force and effect as the original probate of a will." K.S.A. 59-2230 (prior to amendment in 1982).

STATEMENT OF THE CASE

Sarah R. Reed died domiciled in Kansas on June 17, 1978. At the time of her death, she was Director of the School of Library Science at Emporia State University in Emporia, Kansas. Prior to that position, she had been domiciled in Indiana from 1971 to 1975 and was the Assistant Dean of the Graduate Library School at Indiana University in Bloomington, Indiana. During the time she lived in Indiana, she made and executed her will there (Appendix I). Her interest in the education of graduate library students was well known to everyone who associated with her. She never married and was an only child whose parents had died several years before her, leaving her with no close relatives (her alleged heirs at law are cousins, second cousins, and third cousins with whom she had little, if any, contact). Her will gives her entire estate (except for incidental personal items which are given to close friends) to Indiana University Foundation for the Graduate Library School at Indiana University. When she died, she owned real estate and tangible personal property located in Emporia, Kansas, and had accounts at a bank, a savings and loan, and a credit union in Emporia. At her death, she also had an account at a credit union located in Bloomington, Indiana, to which some life insurance was paid as a result of her death.

The Monroe Circuit Court of the State of Indiana duly admitted the will of Sarah R. Reed to probate in Indiana after finding that it had jurisdiction to do so, that the will had been made and executed in Indiana while Miss Reed was domiciled there, and that the will was a signed and attested will under Indiana law (Appendix C).

Based upon the Indiana Court's order for probate and its ruling that the will was a signed and attested will under Indiana law where it was made and executed, Appellants filed their Amended Petition for Probate of Will Probated Elsewhere (Appendix E) in the District Court of Lyon County, Kansas, where Sarah R. Reed was domiciled at her death. The District Court admitted the will to probate upon the grounds of full faith and credit and K.S.A. 59-2229 and 59-2230 (prior to amendment in 1982) after finding that the record of probate from Indiana was duly authenticated, that the Indiana Court had jurisdiction to admit the will to probate in Indiana, and that it (the Kansas Court) had jurisdiction to admit the will to probate because Miss Reed was domiciled in Lyon County, Kansas, and owned property there at her death (Appendix B).

The Supreme Court of the State of Kansas reversed the judgment of the District Court upon the grounds that neither full faith and credit nor the Kansas statutes as applied required that the will be admitted to probate in Kansas (Appendix A).

The constitutional questions were first raised by the Appellants in the Kansas District Court where their Amended Petition requested the following:

> ". . . Petitioners pray that the will of decedent as described above be admitted to probate in accordance with either or both of K.S.A. 59-2230 and the full faith and credit provision of the United States Constitution. . . ." (Appendix E).

Appellants' brief to the District Court in support of their Amended Petition stated the following issues:

> "5. Does the full faith and credit provision of Article IV, Section 1 of the United States Constitution and

the provisions of K.S.A. 59-2229 and 59-2230 require this Court to admit this will to probate?

A. *Full faith and credit without Kansas statutes. . .*

B. *Full faith and credit made applicable by Kansas statutes"*

The District Court held that ". . . The Indiana proceedings are entitled to full faith and credit. . . ." citing *In re Estate of DeLano,* 181 Kan. 729, 315 P.2d 611 (1957), at page 2 of its opinion (Appendix B).

In the Supreme Court of the State of Kansas, Appellants' brief stated the constitutional questions in virtually the same language as used in the District Court, and the Court ruled as follows on these questions (Appendix A):

". . . In order for the doctrine of full faith and credit to apply the court in which the judgment is entered, on which judgment recognition is sought in another state under the full faith and credit clause of the Constitution of the United States, must have jurisdiction of the subject matter and of the parties. Indiana had jurisdiction to (1) admit the instrument for probate as a will in Indiana and (2) jurisdiction to distribute the personal property of Sarah R. Reed within the State of Indiana. . . ." at pages 537-538 of the opinion.

". . . Full faith and credit must be given to the judgments of sister states, but no greater faith and credit than is due the judgment in the state in which it was rendered. . . ." at syllabus 2 and at page 539 of the opinion.

"The Monroe Circuit Court in Indiana neither claimed nor had jurisdiction to determine that the instrument written by Sarah R. Reed was a valid will properly

executed according to the laws of the State of Kansas. . . ." at page 539 of the opinion.[2]

"A second forum may refuse to recognize a foreign decree on the basis it violates public policy of the second forum. . . ." at syllabus 3 of the opinion.[3]

(The rationale for the Court's conclusion that K.S.A. 59-2229 and 59-2230 (prior to amendment in 1982) did not apply to a will made and executed in another state by a person who later dies while a resident of Kansas was that the Kansas legislature had meant that those statutes only serve as procedural statutes to be used in applying K.S.A. 59-806 (Appendix H), which is a statute expressly limited to the probate of the wills of non-residents. The difficulty with this rationale is that K.S.A. 59-806 contains within its own terms the procedure to be followed for its application.)

The constitutional questions presented here were raised and ruled upon in each court below.

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2. As noted above, whether the will was properly executed under Kansas law was not an issue open to the determination of the Supreme Court of the State of Kansas in either of the two cases where the will of Sarah R. Reed was before it (or any lesser Kansas court) because both full faith and credit and the Kansas statutes make the execution of the will a matter to be determined under Indiana law (K.S.A. 59-609 (Appendix G) in the first case, and K.S.A. 59-2229 and 59-2230 (prior to amendment in 1982) in the case which is the subject of this appeal).

3. The Court did not specify how public policy of Kansas was being violated or what public policy it was speaking about, but the implication of the opinion is that because the Court said this will was unsigned, notwithstanding the Indiana Court's order that it was properly made and executed, it would therefore be contrary to Kansas public policy to admit it to probate in Kansas.

THE QUESTIONS ARE SUBSTANTIAL

This case presents substantial questions under the full faith and credit provision of the Constitution of the United States which this Court has either not had the occasion to address or has not addressed within the context of modern circumstances. The constitutionality of the application of state statutes, i.e. K.S.A. 59-2229 and 59-2230 (prior to amendment in 1982), is drawn into question where those statutes recognize the status of a will made and executed in some other state according to the requirements of the other state for execution, and then the statutes are applied by the state court so that such recognition is avoided. In addition, the question is raised as to whether, under full faith and credit and without regard to any choice of law which may have been exercised by a state legislature, the status of a will, which has been judicially determined to be properly made and executed in that state where it was so made and executed, should be judicially recognized in another state.

These questions are important because our highly mobile population of today moves frequently from state to state, and people from all walks of life often own property in various jurisdictions. At the same time, complex differences continue to exist in certain areas of the laws of these various jurisdictions, such as in the wills acts, where technical details in the law have traditionally been emphasized. In times past, only relatively few wealthy persons were likely to own property in more than one state, but now such ownership is commonplace for many people. Where formerly the few people who owned property in multiple jurisdictions might reasonably be expected to meet whatever the technical requirements for the execution of a will might be in any particular jurisdiction, it is not so reasonable today to expect so

many people with lifestyles covering so many jurisdictions to comply with new requirements for the execution of their wills whenever they cross a state line for any length of time.

The cases in this Court since 1925 dealing with full faith and credit (other than three cases where the application of inheritance taxes was the issue) are *Riley v. New York Trust Co.*, 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885 (1941), and *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). Both of those cases recognize the jurisdiction of a state court to deal with the status of a matter before it, or, put another way, to exercise *in rem* jurisdiction and then to have the courts of other states honor the first court's decision under full faith and credit. An earlier case according the same recognition was *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878). A determination of whether or not a will is properly made and executed is normally done in an *in rem* proceeding. 79 *Am. Jur. 2d*, Wills, §839, p. 886.

These cases, as well as numerous others in this Court, also recognize the right of states, by court decision or by legislation, to choose the law of another jurisdiction as to a matter where there might otherwise be a conflict of laws and to have that choice honored under full faith and credit. All of these cases are set out in the leading Kansas case on the subject of full faith and credit, *In re Estate of DeLano*, 181 Kan. 729, 315 P.2d 611 (1957), which Appellants submit was misapplied by the Supreme Court of the State of Kansas in its opinion which is the subject of this appeal.

In the case at hand, the Kansas legislature had chosen in K.S.A. 59-2229 and 59-2230 (prior to amendment in 1982) to apply the law of Indiana in determining whether or not the will of Sarah R. Reed was properly made and executed, and the Indiana court had ruled that the

will was properly made and executed. However, the Supreme Court of the State of Kansas not only would not recognize the status of the will, it would not recognize the choice made by the Kansas legislature to use the law of the place where the will was made and executed, i.e. Indiana, to determine the will's status. The result was a decision to apply a state statute contrary to the full faith and credit provision of the Constitution of the United States.

Apart from any state statutes making a choice of law, in a case decided in 1883 this Court held that full faith and credit did not require that the probate of a will in one state should be effective to transfer the title to real property located in another state. *Robertson v. Pickrell,* 109 U.S. 608, 27 L.Ed. 1049 (1883). The reasoning of *Robertson* is directed toward establishing the title to real property rather than toward the status of a will, but it must be conceded that the holding of the case can be used in support of the judgment below. On the other hand, *Robertson* can be read narrowly and applied only to real property.

However, Appellants submit that given the circumstances of the modern day lifestyles of people within these United States as they move from state to state and own property in several jurisdictions it might be appropriate to abandon the holding of *Robertson* in favor of the recognition of the status of wills from state to state so that when a will has been determined to be properly made and executed under the law of the place where it was made and executed, its status is secure in other states as well. In that event, the status of the will of Sarah R. Reed, having been determined in Indiana to have been properly made and executed under the law of that state where it was made and executed, would be recognized in Kansas courts whether or not the Kansas legislature had chosen to apply Indiana law to the will.

CONCLUSION

For the reasons stated, Appellants respectfully submit that this Court should note probable jurisdiction of this appeal and either summarily reverse the judgment below or set this case for oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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(Served under Rule 28.4(c). The constitutionality of K.S.A. 59-2229 and 59-2230 (prior to amendment in 1982) as applied is drawn in question in this proceeding, and 28 U.S.C. §2403(b) may be applicable.)

APPENDIX

APPENDIX A

No. 54,440

IN THE MATTER OF THE ESTATE OF SARAH R. REED, DECEASED.

RUTH C. SCHILLINGER, AS ADMINISTRATOR OF THE ESTATE OF SARAH R. REED, GEORGE ANDREW REED, MARGARET MOORE, MARIE SIEDSCHLAG, DOROTHY SCHWAB, and VIOLA REED SIMISON, *Appellants*, v. INDIANA UNIVERSITY FOUNDATION AND PAULINE WINNICK, *Appellees*.

SYLLABUS BY THE COURT

1. JUDGMENTS—*Res Judicata—Concurrence of Four Conditions.* An issue is res judicata only when there is a concurrence of four conditions: (1) identity in the things sued for (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of the persons for or against whom the claim is made. *Kumberg v. Kumberg*, 232 Kan. 692, Syl. ¶ 6, 659 P.2d 823 (1983).

2. SAME—*Full Faith and Credit to Judgments of Other States—Limitation to Rule.* Full faith and credit must be given to judgments of sister states, but no greater faith and credit than is due the judgment in the state in which it was rendered.

3. SAME—*Full Faith and Credit to Judgments of Other States—Public Policy.* A second forum may refuse to recognize a foreign decree on the basis it violates public policy of the second forum.

4. WILLS—*Foreign Will.* A foreign will is a will of a person who is not a resident within the state at the time of his death.

5. STATUTES—*Construction—Legislative Intent—Determination by Courts.* In determining legislative intent,

courts are not limited to a mere consideration of the language employed but may properly look into the historical background of the enactment, the circumstances attending its passage, the purposes to be accomplished and the effect the statute may have under the various constructions suggested. *State v. Luginbill,* 223 Kan. 15, Syl. ¶ 2, 574 P.2d 140 (1977).

6. WILLS—*Contest of Will—Statutory Restrictions—Administrator Not Authorized to Appeal Admission of Will Discovered Subsequent to Appointment.* Where a statute, in providing for the contest of a will, sets forth such persons who are entitled to contest a will, the statute controls. K.S.A. 1982 Supp. 59-2224 does not authorize the administrator of an estate to appeal the admission of a will discovered subsequent to the administrator's appointment.

Appeal from Lyon district court, WILLIAM J. DICK, judge. Opinion filed June 10, 1983. Reversed.

Elvin D. Perkins, of Perkins, Hollembeak & Wheeler, of Emporia, argued the cause and was on the brief for Ruth C. Schillinger, Administrator of the Estate of Sarah R. Reed, Deceased, appellant.

John G. Atherton, of Atherton, Sanderson & Vander Velde, of Emporia, argued the cause and was on the brief for George Andrew Reed, Margaret Moore, Marie Siedschlag, Dorothy Schwab and Viola Reed Simison, appellants.

Keith A. Greiner, of Keith A. Greiner, Chartered, of Emporia, argued the cause and was on the brief for the appellees.

The opinion of the court was delivered by

LOCKETT, *J.*: The facts were not disputed and are restated in part from *In re Estate of Reed,* 229 Kan. 431,

625 P.2d 447 (1981) (*Reed I*). Sarah R. Reed died in the Whippoorwill boating accident on Lake Pomona near Vassar, Kansas, on June 17, 1978. At the time of her death, she was Director of the School of Library Science at Emporia State University, and she was a resident of Lyon County, Kansas. Before she came to Kansas she was Assistant Dean of the Graduate Library School at Indiana University in Bloomington, Indiana. While she was living in Indiana she wrote out, in her handwriting and upon a sheet of stationery bearing her name at the top, the following document:

"SARAH R. REED

June 1, 1973

"This is to indicate my wishes should anything happen to me during the period between now and when I make out a will.

"I would like for the following people to have any of my personal and household effects they want: Margaret Griffin (Greenwood Ave.) and Mildred Lowell (Mrs. Wayne) of Bloomington and Pauline Winnick (2800 Quebec Ave., N.W., Washington, D.C. - 201-244-6964). The remaining jewelry goes to Mrs. Robert Johann, 4700 San Jacinto Terrace, Fallbrook, Calif. 92028, since most of it came from her.

"All remaining property including contents of First National Bank Safety Deposit Box goes to I. U. Foundation to be added either to the GLS Birthday Fund or to any other GLS fund where it is used for support for GLS Ph. D. students.

"Witnessed June 2, 1973

[signed] "Benjamin F. Speller, Jr.

[signed] "Bernard M. Fry

[signed] "Clara McLeod"

The instrument contains no signature in the handwriting of Sarah R. Reed; her name appears only in the engraving at the top of the page.

Shortly after Sarah R. Reed's death, a special administrator was appointed; later, the special administrator filed a petition for the issuance of letters of administration, alleging that Sarah R. Reed died intestate. Attached to the petition was the document copied above, which had been found among the deceased's possessions. Petitioner alleged that the document was not a duly executed will, but by reason of its contents "petitioner believes that the Court and the persons named in said instrument should be apprised of the existence of said instrument." An order for hearing was entered and notice given. Indiana University Foundation answered, denying that the decedent died intestate and denying that the instrument dated June 1, 1973, was not a will. Hearing on the petition for letters of administration was held September 29, 1978; both Pauline Winnick and the Foundation appeared by counsel. The court found that Sarah R. Reed died intestate, but added "that the Court's finding that said Sarah R. Reed died intestate is subject to the introduction of any evidence that may rebut the finding of intestacy, which said evidence must be submitted to the Court within the statutory period." Letters of administration were issued and administration of the estate proceeded.

Afterwards, and within nine months of the date of death of the decedent, both the Foundation and Pauline Winnick filed petitions for admission of the document dated June 1, 1973, as the last will and testament of Sarah R. Reed, deceased. A consolidated hearing was held on the petitions for probate of will on June 12, 1979. The administrator appeared in person and by counsel; all other parties appeared by counsel. At the conclusion of the hear-

ing the court found that the instrument offered for probate "does not constitute a will pursuant to K.S.A. 59-606 because it is not signed at the end or pursuant to K.S.A. 59-609 because the term 'subscribed' in the proviso of such statute means 'signed at the end', and therefore the petitions for probate of will filed by Indiana University Foundation and Pauline Winnick are dismissed." *Reed I* followed.

The controlling issue in *Reed I* was whether the instrument, admittedly executed in Indiana, was "subscribed by the testator" as is required by the proviso of K.S.A. 59-609. Petitioners contended the term "subscribed" in the proviso should be interpreted to mean "signed or authenticated as one's own." In support of that contention, petitioners called our attention to K.S.A. 59-2230, which allows foreign probated wills to be admitted to probate in Kansas upon proof of the foreign probate, and contended that if K.S.A. 59-609 was construed to require signing at the end, such a construction would bar the probate in this state of wills executed in jurisdictions which do not require signing at the end, and would be contrary to 59-2230.

In *Reed I* the court examined the history of our statutes governing the execution of wills. Prior to statehood, the Territorial Legislature of 1859 adopted an act providing that except for oral wills, all wills "must be in writing, witnessed by two competent witnesses, and signed by the testator." L. 1859, ch. 131, § 5, codified as G.L. 1862, ch. 215, § 5. That act was repealed, and new statutes governing wills were enacted in 1865. L. 1865, ch. 86, § 2. The The substance of the 1865 act has been carried forward in our probate code through the years. See G.S. 1868, ch. 117, § 2; R.S. 1923, 22-202; G.S. 1935, 22-202; and G.S. 1949, 59-606.

Our first statute, other than procedural statutes, dealing specifically with wills executed outside this state was enacted in 1911, and now appears as K.S.A. 59-609. K.S.A. 59-609 had not been heretofore construed by this court, but the court in *Reed I* reviewed numerous cases dealing with the acts necessary to execute a will under 59-606. (A review of these cases can be found in *Reed I*.)

The court then stated in *Reed I*:

> "The proviso of K.S.A. 59-609 has been a part of that section since its original enactment in 1911. Wills executed outside of this state are recognized, whether executed in the manner required by Kansas statutes or the laws of the state in which the will is executed, or by the laws of the state where the testator resided at the time of execution or at the time of his death; but the proviso requires two things of all such wills: they must be in writing, and they must be subscribed by the testator. An oral will, executed outside the confines of Kansas, is not valid in this state; and a will which is not subscribed by the testator is likewise of no force and effect here. . . .
>
> . . . .
>
> "One other argument advanced by appellants should be given attention; that is the argument that to give effect to the proviso of K.S.A. 59-609 would be contrary to the intent of K.S.A. 59-2230, which provides for the probate in this state of wills probated elsewhere. That statute does not mention 'signing.' K.S.A. 59-2230 provides in substance that if it appears to the satisfaction of the Kansas court that the will has been duly proved and admitted elsewhere, and that it was executed according to the law of the place where it was made, it shall be admitted to probate here. The instrument before us had not been admitted

for probate in Indiana when the proceedings below were held, but counsel advised on oral argument that it has since been admitted in that state. Be that as it may, Indiana statutes clearly require that a will be signed. Ind. Code Ann. §29-1-5-3 [6-503] (a) (Burns, 1980 Supp.), states:

"'(a) The execution of a will, other than a nuncupative will, *must be by the signature of the testator* and of at least two [2] witnesses as follows:

"'(1) The testator, in the presence of two [2] or more attesting witnesses, shall signify to them that the instrument is his will and either:

"'(i) *Sign* the will;

"'(ii) Acknowledge his *signature* already made; or

"'(iii) At his direction and in his presence have someone else *sign* his name for him; . . .' [Emphasis supplied.]

"This document is unsigned. Whether it was 'executed according to the law of the place in which it was made,' however, we leave for resolution of the appropriate court in the event application for probate is later made under K.S.A. 59-2229, -2230. We leave also for resolution in an appropriate court whether 59-609 and 59-2230 should be considered in pari materia. Such issues are not now before us.

"The issue decided above is determinative of this appeal, and other matters raised need not be decided.

"The judgment of the trial court, denying the petitions for probate of the instrument dated June 1, 1973, and holding that that document is not a will

under our statutes, is affirmed." *In re Estate of Reed*, 229 Kan. at 437-39.

Such issues are now before the court. On September 18, 1980, the Monroe Circuit Court Monroe County, Indiana, pronounced the document valid for proper admission to probate in the State of Indiana as the will of Sarah R. Reed. Letters of administration with the will annexed were issued by the Indiana court.

May 8, 1981, Indiana University Foundation filed a Petition for Probate of a Will Probated Elsewhere in the Lyon County District Court. The petition was pursuant to K.S.A. 59-2229 and 59-2230 and stated Sarah R. Reed had been a resident of the State of Kansas at the time of her death. The District Court of Lyon County admitted the handwritten document of Sarah R. Reed to probate pursuant to 59-2230 on March 17, 1982. This appeal followed, raising several issues.

The first issue is whether the order of the District Court of Lyon County, Kansas, denying original probate of the instrument in *Reed I* is res judicata as to the admission to probate of the same instrument under the provisions of 59-2229 and -2230.

The doctrine of res judicata is appropriate when there is an existing final judgment rendered upon the merits, obtained without fraud or collusion, by a court of competent jurisdiction. Such judgment is conclusive of causes of actions and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other court of concurrent jurisdiction

The issue is res judicata only when there is a concurrence of four conditions: (1) identity in the thing sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in

the quality of the persons for or against whom the claim is made. *Kumberg v. Kumberg*, 232 Kan. 692, Syl. ¶ 6, 659 P.2d 823 (1983); *Adamson v. Hill*, 202 Kan. 482, 487, 449 P.2d 536 (1969).

The issue in the first proceeding (*Reed I*) was whether or not the document of Sarah R. Reed was entitled to original probate in Kansas under 59-609 as a will executed in Indiana in accordance with Indiana law. We are now faced with the question of whether or not the document is entitled to probate in Kansas under 59-2229 and -2230 based upon an order admitting the will to probate in the State of Indiana.

There is no identity between the petition presented to the District Court of Lyon County for probate of a will admitted for probate in Indiana based upon 59-2229 and -2230 and the petition in the earlier proceeding (case No. 78 P 82) for original probate of the document in Kansas under 59-609. The second proceeding is not barred under the doctrine of res judicata.

Indiana statutory law provides that Indiana courts have jurisdiction to probate the will of a nondomiciliary decedent and issue letters in any county where the decedent left assets or in any county into which assets come upon the decedent's death. At her death, Sarah R. Reed was the owner of an account of slightly less than $10,000.00 at the Indiana University Employees Federal Credit Union in Bloomington, Indiana. There were in addition two retirement annuity contracts under which death benefits were paid to Indiana University Foundation in Bloomington. On September 18, 1980, the Indiana court admitted the document of Sarah R. Reed for probate as a will in Indiana.

Since the Indiana court admitted the will for probate in Indiana, does the full faith and credit provision of Article

IV, § 1 of the Constitution of the United States require recognition of the document by the courts of the State of Kansas as the will of a decedent resident of the State of Kansas? We believe the full faith and credit provision does not require this result.

Article IV, § 1 of the Constitution of the United States asserts:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

In 28 U.S.C. § 1738 it states that the judicial proceeding of one jurisdiction shall have the same full faith and credit in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

It is well recognized that there are limitations upon the extent to which a state may be required by the full faith and credit clause to enforce the judgments of another state in contravention of its own statutes or public policy. A rigid and literal enforcement of the full faith and credit clause, without regard to the statutes of the forum, would lead to the absurd result that, whenever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. *Pacific Ins. Co. v. Comm'n*, 306 U.S. 493, 501, 83 L.Ed. 940, 59 S.Ct. 629 (1939).

The Indiana court determined:

> "1. Sarah R. Reed died June 17, 1978, with her domicile being the State of Kansas.
>
> . . . .

"5. Sarah R. Reed was on June 1, 1973, and June 2, 1973, domiciled in the State of Indiana.

"6. The execution of the will of Sarah R. Reed meets the requirements of the Indiana Probate Code.

"7. Sarah R. Reed in her own name was the owner of Indiana University Credit Union Account No. 183269 with a value on the date of her death of Nine Thousand Five Hundred Fifteen Dollars and Eighty-one Cents ($9,515.81).

"8. The will of Sarah R. Reed meets the requirements of the Indiana Probate Code for the probate of the will of Sarah R. Reed, the appointment of a personal representative of the estate of Sarah R. Reed and the issuance of letters testamentary for the estate of Sarah R. Reed.

. . . .

"13. The Teachers Insurance and Annuity Association and College Retirement Equities Fund benefits of Sarah R. Reed were payable upon her death to Indiana University Foundation for the use and benefit of the Graduate Library School of Indiana University, Bloomington, Indiana."

The court concluded:

"The will of Sarah R. Reed is a properly executed and witnessed will and, *therefore, a valid will qualified for admission to probate in the State of Indiana.*" Emphasis supplied.

What was the effect of the admission of the document as the will of Sarah R. Reed in the State of Indiana on the State of Kansas? In order for the doctrine of full faith and credit to apply, the court in which the judgment is entered, on which judgment recognition is sought in an-

other state under the full faith and credit clause of the Constitution of the United States, must have jurisdiction of the subject matter and of the parties. Indiana had jurisdiction to (1) admit the instrument for probate as a will in Indiana, and (2) jurisdiction to distribute the personal property of Sarah R. Reed within the State of Indiana.

In *In re Estate of DeLano,* 181 Kan. 729, 315 P.2d 611 (1957), Justice Schroeder (now Chief Justice) set forth the law for the administration of an estate regarding personal property located within and that personal property located outside a state:

> "Two distinct legal propositions entirely separate should be borne in mind. First that the state where personal property is located (whether tangible or intangible personal property) has full power to administer upon it, pay creditors out of it, and dispose of it within constitutional limitations, or, at its option to permit the courts and administrators of other states to take possession and administer it. Second, under normal circumstances the court where the intestate's personal property is located will look to the law of the decedent's domicile to determine heirship, *i.e.*, to determine the persons who succeed to the property and the proportions in which they take. The second proposition is but the usual conflict of laws rule which most courts adopt in order to assure a uniform distribution of all intestate personal property. It is not a mandatory rule, but merely one which most state courts have adopted in the distribution of personal property of a non-resident. Mississippi and Illinois have or had statutes providing that their own intestate laws shall govern distribution of the personal property of a non-resident decedent. (Mississippi Code 1942 Ann., Vol. 1 A, § 467; and Sec. 1 of the Illinois Descent Act,

§ 1872, as amended by Laws 1929, p. 359, § 1, Smith-Hurd Statutes, ch. 39, § 1.) This they are free to do because under the proposition first mentioned they have the absolute and final jurisdiction to determine the disposition of personal property within the borders of the state. The United States Supreme Court cases hereafter discussed will show the first proposition to be a fundamental rule of jurisdiction and the second a matter of comity.

"In the event of any conflicting jurisdictional claims between the states of the union, the ultimate arbiter is the United States Supreme Court. Its opinions and decisions make it abundantly clear that the state of actual *situs* of the intangible has the undeniable legal and constitutional right to administer upon it to the exclusion of all other states, and particularly to the exclusion of the decedent's domicile. [Citations omitted.]

. . . .

"Appellants assert what they contend are two recognized exceptions to the full faith and credit doctrine. First a second forum may refuse to recognize a foreign decree on the basis of public policy, [citations omitted] and second, that the second forum may also refuse full faith and credit upon a determination that the first forum did not have jurisdiction over the person or subject matter, citing *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279.

. . . .

"It is elementary that judicial proceedings upon property in the absence of jurisdiction over that property, lacks and denies due process of law within the meaning of the fourteenth amendment. A statute which permits and directs such judicial proceedings

is void for the same reason. This is exemplified in the Restatement of Law, Conflict of Laws, § 43:

"'If a State attempts to exercise power by creating interests with respect to persons or things which it has no jurisdiction to create, its action is in violation of the Fourteenth Amendment to the Constitution and is void in the State itself. The Supreme Court of the United States may review all cases whether from a lower Federal court or from a State court of last resort which involve a question of the exercise of power on the part of a State when it has no jurisdiction.' (Comment a.)" 181 Kan. at 736-46.

Full faith and credit must be given to judgments of sister states, but no greater faith and credit than is due the judgment in the state in which it was rendered. Under the law of Indiana, the Monroe Circuit Court had the power to distribute personal property located within the state of Indiana. The Monroe Circuit Court in Indiana neither claimed nor had jurisdiction to determine that the instrument written by Sarah R. Reed was a valid will properly executed according to the laws of the State of Kansas, nor did the Indiana court claim or have jurisdiction to distribute real or personal property of Sarah R. Reed located outside the State of Indiana.

When a person dies and leaves property in a state other than his domicile, it may be necessary to prove a will or take out an administration there. Under the common law, courts of states where real property is located have jurisdiction to probate a will devising the property and determine the sufficiency of the form of the will. Kansas and Indiana determined that Sarah R. Reed died while a resident of the State of Kansas. Each court determined that there was no realty located in Indiana. The real property owned by Sarah R. Reed

was located in Lyon County, Kansas, and subject to the probate proceeding filed in the Lyon District Court.

Appellants claim that the provisions of 59-2229 and -2230 do not apply to the will of a decedent who was a resident of the State of Kansas on the date of her death; that 59-2229 and -2230 are procedural statutes to be used in conjunction with K.S.A. 59-806 to prove or admit a foreign will of a nonresident for probate. We agree.

What is a foreign will? There is no definition of the term "foreign will" contained in the Kansas statutes or case law. Black's Law Dictionary 583 (5th ed. 1979) defines the term as follows:

> "Foreign will. Will of person not domiciled within state at time of death. De Tray v. Hardgrove, Tex. Com. App., 52 S.W.2d 239, 240."

The term foreign will is defined in 95 C.J.S., Wills § 340, p. 190 as follows:

> "A 'foreign will' is the will of a person who is not domiciled within the state at the time of his death, or a will made in another state by a testator residing there."

Sarah R. Reed was a resident of the State of Kansas at the time of her death; therefore, the instrument in question could not be considered a foreign will under the preceding definitions.

The 1939 Kansas Probate Code was primarily the work of Samuel E. Bartlett, a practicing attorney in Ellsworth, Kansas. A draft of Bartlett's proposed probate code first appeared in the April, 1938, issue of the Kansas Judicial Council Bulletin. What are now K.S.A. 59-2229 and 59-2230 (prior to the 1982 amendment) appear in that draft

exactly as they appear today in the statute book. Bartlett's draft of what is now K.S.A. 59-2229 and 59-2230 (prior to the 1982 amendment) is adopted from the Uniform Wills Act, Foreign Probated, a uniform law which was approved for adoption by the National Conference of Commissioners on Uniform State Laws in 1915. Bartlett acknowledges such source for these two sections of his draft in the December, 1938 issue of the Kansas Judicial Council Bulletin.

The Uniform Wills Act, Foreign Probated, was withdrawn by the National Conference in 1943 and a new Uniform Probate of Foreign Wills Act was approved in 1950. The 1950 Act was (and is) specifically limited to wills of testators who die domiciled outside of the state applying the Act. The 1915 Uniform Act did not make this distinction. The legislature made no change in 59-2229 and -2230 either when the 1915 Uniform Act was withdrawn or when the 1950 Uniform Act was approved even though there was a significant change in the uniform law, *i.e.*, after 1950 the uniform law expressly stated that it applied only to non-domiciliaries.

Uniform laws are drafted and recommended to the legislatures of the various states for adoption. The principal object of uniform state laws is to provide, as far as possible, uniform laws on subjects involved that would be common to all the states adopting them. They are adopted to remove doubts as to controlling rules of law on the subjects involved and are intended to secure not only identity of the statute, but also uniformity in decision. Such uniform laws are decisive as to all matters comprehended within their terms. 73 Am. Jur.2d, Statutes § 32, p. 287. When the legislature adopts a statute from a uniform law, it carries with it the construction placed upon that statute by the drafters except when such construction is contrary to the constitution or public policy

of the adopting state. In determining the legislative intent, courts are not limited to mere consideration of the language employed but may properly look into the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished and the effect the statute may have under various constructions suggested. *State v. Luginbill,* 223 Kan. 15, 574 P.2d 140 (1977).

The 1982 legislature amended 59-2229 and -2230. K.S.A. 1982 Supp. 59-2229 provides:

> "When a copy of a will executed outside this state and the probate thereof, duly authenticated, is presented by the executor or any other person interested in the will, with a petition for the probate thereof, the court shall fix the time and place for the hearing of the petition, notice of which shall be given to such persons and in such manner as the court shall direct, if the petition is filed within five years after the death of the testator. The title of any purchaser in good faith, without knowledge of the will, to any property derived from the fiduciary, heirs, devisees or legatees of the decedent shall not be defeated by the production of the will of the decedent and the petition for probate thereof after the expiration of nine months from the death of the decedent."

K.S.A. 1982 Supp. 59-2230 provides:

> "If, upon the hearing, it appears to the satisfaction of the court that the will of a resident or nonresident has been proved and admitted to probate outside this state and that it was executed according to the law of the place in which it was made, or in which the testator resided at the time of its execution or of the testator's

death or in conformity with the laws of this state it shall be admitted to probate with the same force and effect as the original probate of a will."

The purpose of the amendments is to create a procedure for probating an instrument executed outside this state, not conforming to requirements of Kansas, but conforming to the laws of the state where the instrument was executed, as a valid will of a resident or a nonresident of Kansas. The fundamental rule of statutory construction is that the purpose and intent of the legislature governs when that intent can be ascertained from the statute. *Kansas State Board of Healing Arts v. Dickerson*, 229 Kan. 627, 629 P.2d 187 (1981).

Appellees claim that if K.S.A. 1982 Supp. 59-2229 and 59-2230 are procedural statutes allowing the will of a resident approved and admitted to probate, executed according to the law of the place where made, they should be applied retroactively. The statutes do not express an intent to have been applied retroactively. A statute operates prospectively unless the statute clearly expresses a legislative intent to have the statute applied retrospectively. *Thome v. City of Newton*, 229 Kan. 375, Syl. ¶ 6, 624 P.2d 454 (1981). Attempts to probate the instruments were commenced May 8, 1981. The amended statute became effective July 1, 1982, more than one year after the attempt to probate. Our statutes relating to will and probate procedure have been strictly construed even though in some rare situations the intent of a testator may be frustrated. The statutes were not retroactive; therefore, the instrument cannot be admitted as a will under the amended statutes.

Should the administrator, who was appointed prior to the district court's order admitting the will to probate, be allowed to appeal that order?

On occasion, after letters of administration have been granted on the assumption that the decedent died intestate, a will executed by the decedent appears. Kansas is one of the jurisdictions that has a statute designed to handle this problem. K.S.A. 59-707 provides:

> "If, after the appointment of an administrator, a will is admitted to probate, the powers of such administrator shall cease, and he or she shall proceed to final accounting. The new executor or administrator with the will annexed shall continue the administration."

The actual probate of a will imposes a duty on the court to revoke any existing letters of administration. The granting of the second administration ipso facto supersedes the first administration. The former administrator is required to settle his accounts and has no further power since that administration has been terminated.

The acts of the administrator done in good faith under the letters of administration are free from collateral attack. The acts of the former administrator are binding on the parties interested in the estate, including the subsequently named executor. Those who have dealt with the former administrator in good faith are protected.

Generally, for one to be entitled to oppose or contest the probate of a will, it is necessary that he be a person interested in the estate or the operation of the will. Whether an administrator of an estate is entitled to contest a will of his decedent there is a split of authority. On the one hand, it has frequently been held that the administrator does not have sufficient interest to entitle him to contest the will of his decedent. However, there is authority that an administrator may be qualified to contest the will of his decedent. It has been held that the basis

of such right is the fact that he represents those who would be entitled to the estate, or hold the assets on their behalf, and hence has the right to see that no testamentary paper is admitted to probate unless genuine. (For an in depth study see *Hill v. District Court*, 126 Mont. 1, 242 P.2d 850 [1952], 31 A.L.R.2d 749.)

Where a statute, in providing for the contest of a will, sets forth such persons who are entitled to contest a will, the statute controls. K.S.A. 1982 Supp. 59-2224 states in part:

> "Any heir, devisee, or legatee may prosecute or oppose the probate of any will . . . ."

Therefore, the administrator may not contest the probate of the will of her decedent.

The judgment of the trial court holding that the document is a will under our statutes and admitting it for probate is reversed.

APPENDIX B

(Filed March 17, 1982)

IN THE
DISTRICT COURT OF LYON COUNTY, KANSAS

Case No. 81 P 68

In the Matter of the Estate of
SARAH R. REED, Deceased.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Sarah R. Reed died June 17, 1978, a resident of Emporia, Lyon County, Kansas.

2. An Administrator was appointed and Letters issued on September 29, 1978, in Lyon County, Kansas, for the probate of her estate in case no. 78 P 82.

3. The Inventory in said estate shows real estate and personal property in Emporia, Lyon County, Kansas; and intangible personal property in Bloomington, Indiana.

4. The Indiana property consists of two credit union accounts, one a time deposit and one a shares account.

5. That the handwritten instrument now admitted to probate in Indiana was filed by the Special Administrator in Lyon County, Kansas, on August 1, 1978, with her Petition For Issuance of Letters of Administration. Petitions for the Admission of said instrument to Probate were filed on February 15, 1979, and March 15, 1979, and an Order for Hearing was filed March 13, 1979. Probate of the document was denied.

6. The handwritten document was offered for probate in Indiana and on September 18, 1980, the Indiana Court,

in its Findings of Fact and Conclusions of Law found the document to be the properly executed and witnessed will of decedent qualified for admission to probate in the State of Indiana.

7. Said will was admitted to probate and Letters of Administration with Will Annexed were issued by the Indiana Court on May 8, 1981.

8. The Petition for Probate of Will Probated Elsewhere was filed in this Court May 8, 1981, under K.S.A. 59-2229 and 59-2230.

9. Said will was drawn and executed June 1 and 2, 1973, in Indiana where decedent resided at that time.

10. A copy of the will executed in Indiana and the probate thereof, duly authenticated, has been presented with Petitions for the probate of the same in Kansas. Notice of the hearing on the Petitions is approved.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and subject matter.

2. The applicable statutes under which this will is being offered are K.S.A. 59-2229 and 59-2230.

3. K.S.A. 59-2229 and 59-2230 are clear on their face and are not restricted to the wills of non-residents. When a statute is plain and unambiguous the Court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be. *Johnson v. McArthur*, 226 Kan. 128, 596 P.2d 148 (1979) at page 135.

4. The will was executed according to the law of the place in which it was made and in which the testator resided at the time of the making of the will. The court

file includes the Findings of Fact and Conclusions of Law of the Indiana Court specifically finding that the will was properly executed and valid for proper admission to probate in Indiana.

5. K.S.A. 59-2230 makes no mention of any requirement of signing at the end of the will.

6. There was personal property with its situs in Indiana, therefore conferring jurisdiction in that state to admit said document to probate. *Burns' Indiana Statutes,* 29-1-7-1; *Parnell v. Thompson,* 81 Kan. 119, 105 Pac. 502 (1909); *Hofferd v. Coyle,* 212 Ind. 520, 8 N.E.2d 827 (1939).

7. The issue before the Court in this case is not *res judicata* by reason of the decision in case no. 78 P 82. *Keith v. Schiefen-Stockham Ins. Agency, Inc.,* 209 Kan. 537, 498 P.2d 265 (1972); *In re Estate of Reed,* 229 Kan. 431, 625 P.2d 447 (1981).

8. K.S.A. 59-617 has been complied with by the filing of the Petition for the probate of the will within nine months of the death of Sarah R. Reed, approved notice having been given at that time. Offering the will now under K.S.A. 59-2229 does not ignore that statute.

9. The will has been duly proved and admitted to probate in Indiana.

10. The Indiana proceedings are entitled to full faith and credit. *In re Estate of DeLano,* 181 Kan. 729, 315 P.2d 611 (1957).

11. The will of Sarah R. Reed is admitted to probate under K.S.A. 59-2230.

IT IS SO ORDERED this 17th day of March, 1982.

/s/ William J. Dick
William J. Dick
Associate District Judge

APPENDIX C

(Filed September 1, 1980)

IN THE MONROE CIRCUIT COURT

Cause No. ES7910-015A

STATE OF INDIANA)
) SS:
COUNTY OF MONROE)

IN THE MATTER OF THE ESTATE OF
SARAH R. REED, DECEASED

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Sarah R. Reed died June 17, 1978, with her domicile being the State of Kansas.

2. Sarah R. Reed wrote a holographic will for herself June 1, 1973.

3. Sarah R. Reed acknowledged her holographic will in the presence of Benjamin F. Speller, Bernard M. Fry and Clara McLeod in an airplane leaving Indianapolis, Indiana, in route to Ann Arbor, Michigan, June 2, 1973.

4. Benjamin F. Speller, Bernard M. Fry and Clara McLeod, as attesting witnesses signed the will of Sarah R. Reed in the presence of Sarah R. Reed and in the presence of each other.

5. Sarah R. Reed was on June 1, 1973, and June 2, 1973, domiciled in the State of Indiana.

6. The execution of the will of Sarah R. Reed meets the requirements of the Indiana Probate Code.

7. Sarah R. Reed in her own name was the owner of Indiana University Credit Union Account No. 183269 with

a value on the date of her death of Nine Thousand Five Hundred Fifteen Dollars and Eighty-one Cents ($9,515.81).

8. The will of Sarah R. Reed meets the requirements of the Indiana Probate Code for the probate of the will of Sarah R. Reed, the appointment of a personal representative of the estate of Sarah R. Reed and the issuance of letters testamentary for the estate of Sarah R. Reed.

9. That the paper upon which Sarah R. Reed wrote her will had her name imprinted at the top of the paper which was her personal stationery.

10. That it was the custom of Sarah R. Reed when using her personal stationery not to affix her signature at the bottom or close of her communication.

11. The interest of Sarah R. Reed in the education of graduate library students was well known to all persons associated with Sarah R. Reed.

12. Sarah R. Reed was the Assistant Dean of the Graduate Library School at Indiana University from 1971 to 1975.

13. The Teachers Insurance and Annuity Association and College Retirement Equities Fund benefits of Sarah R. Reed were payable upon her death to Indiana University Foundation for the use and benefit of the Graduate Library School of Indiana University, Bloomington, Indiana.

14. The initials G.L.S. used in the will of Sarah R. Reed stand for Graduate Library School.

15. That Sarah R. Reed was under no undue influence or duress of any kind and was of sound and disposing mind and memory at the time of the execution of her will.

CONCLUSIONS OF LAW

The will of Sarah R. Reed is a properly executed and witnessed will and, therefore, a valid will qualified for admission to probate in the State of Indiana.

MEMORANDUM

In order to satisfy the decedent's testamentary intent, Indiana courts have upheld wills despite irregularities in their forms. The courts have held that the decedent's signature need not appear on the purported Will if there is a mark or symbol of the decedent on the document. A signing by a mark has been deemed a valid execution of the will, and any mark used by the testator to stand for his name and show his assent to the will, is sufficient. *Rook v. Wilson*, 142 Ind. 24, 41 N.E. 311 (1895).

Further evidence that formalities with respect to the testator's signature need not be rigidly adhered to comes from those cases wherein the courts have held that the place of the signature is immaterial. *Thrift Realty Co. v. White*, 90 Ind. App. 116, 168 N.S. 250 (1929). The placement of the testator's name after the attestation clause [*Hallowell v. Hallowell*, 88 Ind. 251 (1882)] or at the top of a will [*Thrift Trust Co. v. White*, 90 Ind. App. 116, 167 N.E. 141, 1929, rehearing denied *Thrift Realty Co. v. White*, 90 Ind. App. 116, 168 N.D. 250, 1929] has been considered sufficient.

In *Thrift Trust Co. v. White*, 90 Ind. App. 116, 168 N.E. 141 (1929), the Appellate Court of Indiana held that a document entirely in the handwriting of the decedent, except for the signatures of the witnesses, which was not signed by the decedent but which began with the words "The Will of Belle Stockman" was a valid signed and attested will under Indiana law. The court stated: "Good-faith

wills are solemn instruments, not to be set aside by the courts because of mere irregularities as to form; they should be upheld when it is possible within the law to do so." P. 143 of 168 N.E.

The appellate court in *White* also cited with approval the cases of *Lemayne v. Stanley*, 3 Lev. 1, 83 Eng. Reprint 545 (1681); *In re Norris Estate*, 221 Mich. 430, 191 N.W. 238 (1922); *Meads v. Earle*, 205 Mass. 553, 91 N.E. 916 (1910); and *Armstrong v. Armstrong*, 29 Ala. 538 (1857). The court pointed out that the statutes governing the execution of wills in Michigan, Massachusetts, and Alabama were substantially the same as the Indiana statute. In *Lemayne* the court of common pleas held that the name of the testator written by himself at the beginning of the will, and not appearing elsewhere in the instrument, was a sufficient signature.

In the cases of *In re Norris Estate* and *Meads v. Earle* the testator's name appeared in the initial and attestation clauses, but did not otherwise appear on the instrument. Nonetheless, in both cases the courts held that the signing was sufficient and the will duly executed. The same result was reached by the Supreme Court of Alabama in the case of *Armstrong v. Armstrong*, where an attested will containing the testator's name only in the heading or body was written by another at the testator's direction and was not signed at the close.

In *Farula v. Schumaker*, ... Texas Civ. App. ....., 178 S.W.2d 542 (1944), the Texas court held that a document was a valid signed and attested will where it was entirely in typewritten form done by the testator including the signature.

In the case of *In re Romaniew's Will*, 296 N.Y.S. 925 (1937), the New York court found a document to be a valid

signed and attested will where the testator had placed two fingerprints on the document but did not otherwise sign it. The court held that the fingerprints constituted a signature and ruled that a testator's name printed, lithographed or typewritten on a will could serve as a signature.

In *Flagle v. Martinelli*, ... Ind. App. ....., 360 N.E.2d 1269 (1977), the Indiana Court of Appeals approves the following language from *Langbein, Substantial Compliance With the Wills Act*, 88 Harv. L. Rev. 489 (1975):

> "The finding of a formal defect should lead not to automatic invalidity, but to a further inquiry; does the noncomplying document express the decedent's testamentary intent, and does its form sufficiently approximate Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act.?"

The Court concludes that *Thrift Trust Co. v. White* is the statement of Indiana law that renders the will of Sarah R. Reed properly executed and valid for the proper admission to probate in the State of Indiana.

SO ORDERED this 18th day of September, 1980.

/s/ John G. Baker
John G. Baker
Special Judge
Monroe Circuit Court

(Filed May 8, 1981)

IN THE MONROE CIRCUIT COURT

Cause No. ES7910-015A

STATE OF INDIANA)
) SS.
COUNTY OF MONROE)

IN THE MATTER OF THE
SUPERVISED ESTATE OF
SARAH R. REED, DECEASED

ORDER PROBATING WILL, AUTHORIZING ISSUANCE OF LETTERS TESTAMENTARY AND SUPERVISED ADMINISTRATION.

Comes now, Thomas M. McGlasson, having filed his verified Petition for the Probate of Decedent's will, Issuance of Letters, and for Supervised Administration of said decedent's estate, which petition is in the words and figures following, to-wit:

(H.I.)

And the Court having examined said petition and being duly advised in the premises, now finds that the averments thereof are true, and that the legatees and devisees under the decedent's Last Will and Testament are as follows:

Margaret Griffin

Mildred Lowell

Pauleen Winnick

Mrs. Robert Johann

Indiana University Foundation

That Findings of Fact and Conclusions of Law was executed by Judge John G. Baker, Special Judge, Monroe Circuit Court, on September 18, 1980, finding that said Last Will and Testament of Sarah R. Reed to be properly executed and valid for the proper admission to probate in the State of Indiana.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, by the Court that:

1. Such written instrument purporting to be the Last Will and Testament of such decedent be and it is hereby admitted to probate and recorded as such.

2. That said administrator with Will Annexed serve upon taking an oath.

3. That First National Bank of Bloomington is appointed as administrator with Will Annexed of the estate of Sarah R. Reed.

4. That the Clerk be and he is hereby directed to issue Letters of Administration with the will annexed to First National Bank of Bloomington, when they have taken and subscribed before the Clerk an oath as such administrator with the will annexed. All of which is ordered this 8th day of May, 1981.

/s/ John G. Baker
John G. Baker, Special Judge
Monroe Circuit Court

APPENDIX D

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 82-5444O-A

IN THE MATTER OF THE ESTATE OF
SARAH R. REED, DECEASED.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Indiana University Foundation and Pauline Winnick, Appellants, hereby appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Kansas entered on June 10, 1983. The judgment of the Supreme Court of the State of Kansas reversed the judgment of the District Court of Lyon County, Kansas, which had admitted the will of Sarah R. Reed to probate in Kansas based upon probate of the will in Indiana.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: September 2, 1983.

Keith A. Greiner, Chartered,
By: /s/ Keith A. Greiner
Keith A. Greiner
501 Citizens Bank Building
P. O. Box 708
Emporia, Kansas 66801
316-342-1157
Attorneys for Appellants

AFFIDAVIT OF SERVICE

STATE OF KANSAS)
) SS:
COUNTY OF LYON)

BEFORE ME, the undersigned authority, on this 2nd day of September, 1983, personally appeared Keith A. Greiner, who being by me first duly sworn, stated on his oath the following:

"My name is Keith A. Greiner. I am counsel of record for Appellants, Indiana University Foundation and Pauline Winnick, in this case. True and correct copies of the above Notice of Appeal were served on September 2, 1983, by delivering such copies to counsel of record for Appellees or to an employee of such counsel at counsel's office address as follows:

John G. Atherton, Atherton, Sanderson & Vander-Velde, 304 Citizens Bank Building, Emporia, Kansas 66801;

and in like manner to counsel of record for Ruth C. Schillinger, who the undersigned believes does not have an interest in the outcome of the appeal, or to an employee of such counsel at counsel's office address as follows:

Elvin D. Perkins, Perkins, Hollembeak & Wheeler, 401 Citizens Bank Building, Emporia, Kansas 66801.

All parties required to be served have been served."

/s/ Keith A. Greiner
Keith A. Greiner

SUBSCRIBED AND SWORN TO before me on this 2nd day of September, 1983.

/s/ Jeanette K. Woodruff
Jeanette K. Woodruff
Notary Public for the State of Kansas

My Appointment Expires: September 1, 1985

Received by the Clerk of the Supreme Court of the State of Kansas on the 6th day of September, 1983.

Copy received by the Clerk of the District Court of Lyon County, Kansas, the court possessed of the record, in Emporia, Kansas, on the 2nd day of September, 1983.

11-92P-1(2)

APPENDIX E

(Filed July 23, 1981)

IN THE
DISTRICT COURT OF LYON COUNTY, KANSAS

No. 81-P-68
Chapter 59

In the Matter of the Estate of
SARAH R. REED, Deceased

AMENDED PETITION FOR PROBATE OF WILL PROBATED ELSEWHERE

(K.S.A. 59-2229 and 2230)

Petitioners show the Court that they are each legally competent; that Petitioner Indiana University Foundation's principal place of business is at Showalter House, P. O. Box 500, Bloomington, Indiana 47402, which is its post office address; that Petitioner Pauline Winnick resides at 2800 Quebec Avenue, Apt. #918, Washington, D.C. 20008, which is her post office address; that Petitioners each have an interest in the above estate; that the above decedent died testate at Pamona, Kansas, on June 17, 1978; that at the time of death, decedent was a resident of Lyon County, Kansas, and a citizen of the United States; and

that decedent was survived by the following named persons who are all of the legatees and devisees under decedent's will:

Name	Relationship	Majority Status	Address and Residence
Margaret Griffin	None	Adult	1009 Greenwood Avenue Bloomington, IN 47401
Mildred Lowell (Mrs. Wayne)		Now Deceased	
Pauline Winnick	None	Adult	2800 Quebec Avenue Apt. #918 Washington, D.C. 20008
Catherine Anne Johann	None	Adult	4700 San Jacinto Terrace Fallbrook, CA 92028
I. U. Foundation (Indiana University Foundation)			P. O. Box 500 Bloomington, IN 47401 ATTN: Mr. Thomas M. McGlasson

Petitioners further show the Court that decedent's will was duly approved and admitted to probate in the Monroe Circuit Court of the State of Indiana, Cause No. ES7910-015A; and that duly authenticated copies of the will and the order admitting it to probate outside this state have been filed in these proceedings and are made part of this Amended Petition.

Petitioners further show the Court that decedent made and executed such will and such will was attested on June 1 and June 2, 1973, while a resident of Bloomington, Monroe County, Indiana, where decedent served as Associate Dean of the Graduate Library School at the University of Indiana from the fall of 1971 until the summer of 1975 when decedent moved to Emporia, Lyon County, Kansas, and became Director of the School of Library Sci-

ence at Emporia State Universtiy; that at the time such will was made, executed and attested decedent owned real and personal property, substantially all of which was located in Monroe County, Indiana; and that at the date of decedent's death she continued to own certain of such personal property, some of which was still located in Monroe County, Indiana.

Petitioners further show the Court that decedent left property within this county upon which the will may operate; that the will has not been admitted to probate in any other county in this state; and that an administration in this state of decedent's estate in accordance with the will is necessary in order to complete the administration of the estate begun in Case No. 78-P-82 in this Court.

Petitioners further show the Court that no executor is named in the will but that either the Administrator in Case No. 78-P-82 or Keith A. Greiner, Chartered is a suitable and proper person to whom to grant letters of administration with the will annexed and that administration is not sought under the Kansas Simplified Estates act because administration as a simplified estate will not be in the best interests of the creditors, heirs, legatees and devisees.

WHEREFORE, Petitioners pray that the will of decedent as described above be admitted to probate in accordance with either or both of K.S.A. 59-2230 and the full faith and credit provision of the United States Constitution (Aricle IV, Section 1) and that letters of administration with the will annexed be issued to the above named person or firm as administrator c.t.a.

Dated: July 21, 1981.

INDIANA UNIVERSITY FOUNDATION
and PAULINE WINNICK
By: KEITH A GREINER, CHARTERED
By:

.....

501 Citizens Bank Building
Emporia, Kansas 66801
316-342-1157
Attorneys for Petitioners

STATE OF KANSAS)
) SS:
COUNTY OF LYON)

The undersigned of lawful age being first duly sworn upon oath states that the undersigned is an attorney for the Petitioners named above and has read the above and foregoing Amended Petition for Probate of will and knows the contends of it and that all the statements contained in it are true.

.....
Keith A. Greiner

Subscribed and sworn to before me this 21st day of July, 1981.

.....
Notary Public

My Appointment Expires:

APPENDIX F

(Filed December 6, 1982)

IN THE
SUPREME COURT OF THE STATE OF KANSAS

ORDER

Pursuant to K.S.A. 20-3018(c), the following cases are hereby transferred from the Court of Appeals to the Supreme Court:

No. 54,440 (*Estate of Reed v. Indiana Univ. Foundation*)

No. 54,623 (*Potts v. Goss*)

No. 54,862 (*Coats v. U.S.D. 353*)

BY ORDER OF THE COURT this 6th day of December 1982.

/s/ Alfred G. Schroeder
Alfred G. Schroeder
Chief Justice

APPENDIX G

59-609. Will executed without state. A will executed without this state in the manner prescribed by this act, or by the law of the place of its execution, or by the law of the testator's residence either at the time of its execution or of the testator's death, shall be deemed to be legally executed, and shall have the same force and effect as if executed in compliance with the provisions of this act: *Provided*, Said will is in writing and subscribed by the testator. [L. 1939, ch. 180, § 45; July 1.]

APPENDIX H

59-806. Same; proceedings, procedures and substantive rights relating to property, laws applicable; matters not affected; descent of property; support and family allowances; distribution; proportionate distribution. The law of this state respecting proceedings, procedures and substantive rights relating in any way to the property in this state of a non-resident decedent and its disposition, including by way of illustration, but not limited to, all matters relating to (i) the commencement and conduct of an administration, (ii) distributions during or at the conclusion of an administration, (iii) any trust created under the will of a nonresident decedent, shall apply as if the decedent had been a resident of this state, subject to the following: (*a*) Nothing in this act shall be deemed to affect:

(1) Methods of proving foreign wills or the admissibility of such wills to probate or to record. Authenticated copies of wills, proved outside of this state according to the laws in force in the place where proved, relative to any property in this state, may be admitted to probate and record in the district court of any county in this state where any part of such property may be situated; such authenticated copies so admitted and recorded shall have the same validity as wills proved in this state in conformity with the laws thereof; and upon such admission to probate the court shall determine whether administration in this state is necessary;

. . . .

APPENDIX I
Sarah R. Reed

June 1, 1973

This is to indicate my wishes should anything happen to me during the period between now and when I make out a will.

I would like for the following people to have any of my personal and household effects they want: Margaret Griffin (Green Wood Ave.) and Mildred Powell (Mrs. Wayne) of Bloomington and Pauline Winnick (2800 Grace Ave. N.W., Washington, D.C. - 301-244-6962). The remaining jewelry goes

to Mrs. Robert Jordan
4700 San Jacinto
Terrace, Fallbrook,
Calif. 92028, ~~same~~
most of it came from her.
All remaining property
including contents of
First National Bank Safety
Deposit Box goes to D.H.
Foundation to be added
dollar to the GLS Birthday
fund or to any other GLS
fund where it is used
for support of GLS Ph.D.
students.

Witnessed June 2, 1973
1. Corinne Hoff
2. Ballard McKay
3. Clara McLeod

Office-Supreme Court, U.S.
FILED
OCT 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-405

In The

Supreme Court of the United States

October Term, 1983

INDIANA UNIVERSITY FOUNDATION
AND PAULINE WINNICK,
Appellants,

vs.

GEORGE ANDREW REED, MARGARET MOORE,
MARIE SIEDSCHLAG, DOROTHY SCHWAB
AND VIOLA REED SIMISON,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

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No. 83-405

In The

Supreme Court of the United States

October Term, 1983

INDIANA UNIVERSITY FOUNDATION
AND PAULINE WINNICK,
Appellants,

vs.

GEORGE ANDREW REED, MARGARET MOORE,
MARIE SIEDSCHLAG, DOROTHY SCHWAB
AND VIOLA REED SIMISON,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

OPINION BELOW

This is an appeal from the decision of the Supreme Court of Kansas denying probate in Kansas to a document admitted to probate in the State of Indiana as the will of a decedent resident of the State of Kansas.

JURISDICTION

1. Appellees concede that this court has jurisdiction of the question of the application of full faith and credit under the provisions of 28 U. S. C., Section 1257 (2), but deny that the question of jurisdiction is substantial for the reason that the question of full faith and credit as applied to the facts herein has been explicitly foreclosed by previous decision of the Supreme Court so as to leave no room for a real controversy.

2. Appellees further deny that this court has jurisdiction of this case for the reason that the decision of the Supreme Court of the State of Kansas rests upon adequate state grounds.

3. Appellees further deny that this court has jurisdiction of the question as to the constitutionality of K. S. A. 59-2229 and 59-2230 for the reason that the constitutionality of the statutes has not been before the Supreme Court of the State of Kansas.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are set forth in appellants' Jurisdictional Statement.

STATEMENT OF THE CASE

The material facts are set out in the decision of the Supreme Court of Kansas appearing as Appendix A, page A 1, *et seq.*, of appellants' Jurisdictional Statement, and we will briefly summarize the facts upon which we rely. Sarah R. Reed died near Vassar, Kansas, on June 17, 1978, a resident of the State of Kansas. She had formerly resided in the State of Indiana, and while residing there wrote in her handwriting upon a sheet of stationery bearing her name at the top a document dated June 1, 1973 indicating her wishes ". . . should anything happen to me during the period between now and when I make out a will." The instrument was signed June 2, 1973, by three witnesses (A 3, A 39, 40), but contained no signature in the handwriting of Sarah R. Reed. Following her death a special administrator was appointed who filed a Petition for the Issuance of Letters of Administration alleging that Sarah R. Reed died intestate. Attached to the petition was the document dated June 1, 1973, and contained in the petition were allegations that the document was not a duly executed will but by reason of its content, ". . . Petitioner believes that the Court and the persons named in said instrument should be apprised of the existence of said instrument." An order for hearing was entered and notice was given, and appellant Indiana University Foundation answered denying that decedent died intestate and denying that the document dated June 1, 1973, was not a will. At the hearing on the Petition for Issuance of Letters of Administration held September 29, 1978, both appellants herein appeared by counsel and the court found that Sarah R. Reed died intestate, but that the finding of intestacy was subject to the introduction of any evidence that may

rebut the finding, and that such evidence must be submitted to the court within the statutory period. Letters of Administration were issued and administration of the estate proceeded. Within the nine-month statutory period, appellants herein filed their petition for administration of the document dated June 1, 1973, as the last will and testament of Sarah R. Reed, deceased. A hearing was held on the consolidated petitions on June 12, 1979, (A 4) at which time the court found that the document offered for probate "does not constitute a will pursuant to K. S. A. 59-606 because it is not signed at the end or pursuant to K. S. A. 59-609 because the term 'subscribed' in the proviso of such statute means 'signed at the end', and therefore the petition for probate of will filed by Indiana University Foundation and Pauline Winnick, are dismissed." (A 5). The court's judgment was appealed by Indiana University Foundation and Pauline Winnick, appellants herein, to the Supreme Court of the State of Kansas (Reed I), and upon argument of that appeal, counsel for Indiana University Foundation and Pauline Winnick advised the Supreme Court of Kansas on oral argument that the document dated June 1, 1973, had been admitted to probate in Indiana after the proceedings held below on June 12, 1979. The Supreme Court of Kansas affirmed the judgment of the trial court denying the petitions for probate of the instrument dated June 1, 1973, and holding that the document is not a will under the statutes of Kansas (A 7, 8).

On September 18, 1980, the Monroe Circuit, Court, Monroe County, Indiana, pronounced the document as valid for proper admission to probate in the State of Indiana as the will of Sarah R. Reed, and Letters of

Administration with the will annexed were issued by the Indiana court. On May 8, 1981, Indiana University Foundation filed a Petition For Probate of a Will Probated Elsewhere in the Lyon County, Kansas, District Court. The petition was pursuant to K. S. A. 59-2229 and 59-2230 and stated Sarah R. Reed had been a resident of the State of Kansas at the time of her death. On March 17, 1982, the District Court of Lyon County, Kansas, admitted the handwritten document of Sarah R. Reed to probate pursuant to K. S. A. 59-2230 (A 8). The district court made several conclusions of law among which were that (1) K. S. A. 59-2229 and 59-2230 are not restricted to the wills of nonresidents and (2), that the Indiana proceedings are entitled to full faith and credit, and that the will of Sarah R. Reed is admitted to probate under K. S. A. 59-2230 (A 22, 23). The administrator of the estate of Sarah R. Reed, together with several heirs consisting of the appellees herein, appealed the judgment and decision of the District Court of Lyon County, Kansas, to the Supreme Court of the State of Kansas (Reed II), and following oral arguments, that court on June 10, 1983, entered its opinion reversing the District Court of Lyon County, Kansas (A 2, 20), holding among other things that the full faith and credit provision, Article IV, Section 1, of the Constitution of the United States, does not require recognition of the document in question by the courts of the State of Kansas as the will of a decedent resident of the State of Kansas (A 9, 10). In support of this holding, the court noted that the Indiana court had concluded:

> "The will of Sarah R. Reed is a properly executed ad witnessed will and, therefore, *a valid will qualified for admission to probate in the State of Indiana.*" (Emphasis supplied) (A 11)

The Kansas Supreme Court further held that in order for the doctrine of full faith and credit to apply, the court in which the judgment is entered and on which judgment recognition is sought in another state under the full faith and credit clause of the Constitution of the United States, must have jurisdiction of the subject matter and of the parties, and that Indiana had jurisdiction to (1) admit the instrument for probate as a will in Indiana and (2) jurisdiction to distribute the personal property of Sarah R. Reed within the State of Indiana (A 11, 12). The Kansas Supreme Court went on to find:

> "The Monroe Circuit Court in Indiana neither claimed nor had jurisdiction to determine that the instrument written by Sarah R. Reed was a valid will properly executed according to the laws of the State of Kansas, nor did the Indiana court claim or have jurisdiction to distrbute real or personal property of Sarah R. Reed outside the State of Indiana." (A 14)

The Kansas Supreme Court also based its decision on a second finding to the effect that the provisions of K. S. A. 59-2229 and 59-2230 do not apply to the will of a decedent who was a resident of the State of Kansas on the date of her death. The Court further stated that statutes are procedural statutes to be used in conjunction with K. S. A. 59-806 to prove or admit a foreign will of a nonresident for probate; that a foreign will is the will of a person not domiciled within the state at the time of death and that inasmuch as Sarah R. Reed was a resident of the State of Kansas at the time of her death, the instrument in question could not be considered a foreign will (A 15).

This appeal followed.

ARGUMENT AND AUTHORITIES

From a reading of appellants' Jurisdictional Statement, there are two separate questions on appeal. The first deals with the question of the application or failure to apply full faith and credit by the Kansas Supreme Court to the judgment of the Indiana Court admitting the document in question to probate in Indiana as the last will and testament of decedent, Sarah R. Reed, a resident of the State of Kansas.

The second question presented is more difficult to discern. It involves two Kansas statutes, K. S. A. 59-2229 and 59-2230, which are both admittedly procedural statutes. It would initially appear that appellant's complaint is the interpretation placed upon these statutes by the Kansas Supreme Court when it held that the statutes do not apply to the will of a resident decedent but only to a foreign will of a nonresident of Kansas (A 15). At page 11 of their Jurisdictional Statement, appellants vaguely question the constitutionality of the two statutes in question.

Appellees will, therefore, consider three separate questions:

QUESTION I. Whether full faith and credit is a substantial federal question for the invoking of the jurisdiction of this court.

QUESTION II. Whether this court has jurisdiction to review the decision of the Supreme Court of Kansas when that decision rests upon adequate state grounds.

QUESTION III. Whether this court has jurisdiction to consider whether K. S. A. 59-2229 and 59-2230 are re-

pugnant to the United States Constitution under the existing facts and circumstances.

QUESTION I. Whether full faith and credit is a substantial federal question for invoking of the jurisdiction of this court.

At the time appellants petitioned the Indiana Court for admission of the document dated June 1, 1973, to probate as the will of a nonresident decedent, the District Court of Lyon County, Kansas, the residence of decedent, had already determined that the document did not constitute a will under Kansas law and had denied it probate in Kansas. Following the affirmance of the District Court's decision by the Supreme Court of Kansas in Reed I, appellants petitioned the District Court of Lyon County, Kansas, for admission of the same document to probate based upon the granting of full faith and credit to the Indiana Court's decision. Thus appellants were using full faith and credit as a means of doing indirectly that which they had been unable to do directly. They were attempting to substitute the law of the State of Indiana, which presumably permitted the admission of the document as a will in Indiana for the law of the State of Kansas, decedent's residence. All that the Indiana Court did was to find that the decedent was a resident of Kansas (A 24), that decedent was the owner of an account in the Indiana University Credit Union (A 24, 25); that the will was qualified for admission to probate in Indiana (A 26) and did admit it to probate in Indiana (A 28). The Indiana Court did not find that it was a properly executed will under Kansas laws and did not find that it was admissible to probate in Kansas. Obviously the Indiana Court had no

jurisdiction to do this. The Kansas Supreme Court, in its decision in Reed II, did nothing to disturb the judgment and order of the Indiana Court but it was not bound by it because the Indiana Court neither claimed nor had jurisdiction to make such an order (A 14). It was stated many years ago in *Robertson v. Pickrell,* 109 U. S. 608, 27 L. Ed. 1049 (1883):

> "The Act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States, does not require that they shall have any greater force and efficacy in other courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle and, as we said on a former occasion, would contravene the policy of the provisions of the Constitution and laws of the United States on that subject. *Board of Public Works v. Columbia Coll.,* 17 Wall., 529 (84 U. S., XXI., 691)."

This court further said in that case with regard to the admission of wills where real estate is concerned as summarized in syllabi 2 and 3 thereof:

> "The law of the place governs as to the formalities necessary to the transfer of real property, whether testamentary or *inter vivos.*"

> "The probate of a will of real property in one State is of no force in establishing the validity of the will as to real property in another State. That must be determined by the laws of the State where the property is situated."

The Kansas Supreme Court, having already decided in Reed I that the document dated June 1, 1973, did not constitute a will under the laws of the State of Kansas, and

was therefore not subject to probate, was not required in Reed II to suddenly reverse itself and admit the document to probate in Kansas based on the fact that it had been admitted to probate in Indiana for the limited purpose of passing personal property located in Indiana. This court stated in *State Farm Mutual Automobile Insurance Company v. Duel,* 324 U. S. 154, 89 L. Ed. 812, 65 S. Ct. 573 (1945), Reh den 324 U. S. 887, 89 L. Ed. 1436, 65 S. Ct. 856 (1945):

> "The full faith and credit clause of the Federal Constitution may not be used to compel one state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."

A somewhat similar issue was considered by this court in *Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association, et al.,* 455 U. S. 691, 71 L. Ed. 2d 558, 102 S. Ct. 1357 (1982), where it was stated in Headnote No. 2:

> "Under full faith and credit principles, a judgment of a court in one state is conclusive upon the merits in a court in another state *only if the court in the first state had power to pass on the merits, that is that it had jurisdiction to render the judgment;* thus, before a court is bound by the judgment rendered in another state, it may inquire into the jurisdictional basis of the foreign court's decree, and if that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given." (Emphasis supplied.)

When appellants filed their second petition in the District Court of Lyon County, Kansas, on May 8, 1981, Petition for Probate of a Will Admitted Elsewhere, the Su-

preme Court of Kansas had already denied the document in question admission to probate based on Kansas law (Reed I). This court stated in *Pacific Employers Insurance Company v. Industrial Accident Commission*, 306 U. S. 493, 501, 83 L. Ed. 940, 59 S. Ct. 629 (1939):

> "While the purpose of that provision was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. As was pointed out in *Alaska Packers Assn. v. Industrial Accident Comm'n.*, 294 U. S. 547, 79 L. Ed. 1052, 55 S. Ct. 518 (1935): 'A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, whenever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.'"

The Supreme Court went on to say in *Pacific*:

> "It has often been recognized by this court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgments of another state in contravention of its own statutes or policies. . . . And in the case of statutes, the extrastate effect of which congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that *the full faith and credit clause does not require one state to substitute for its own statute applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state*

of its enactment with respect to the same persons and events." (Emphasis supplied.)

From the foregoing cases, it is obvious that the Supreme Court of the United States has ruled on the question of full faith and credit as it applies to facts similar to the present case so as to leave no room for controversy and the question as to the application of full faith and credit in this case is not substantial.

QUESTION II: Whether this court has jurisdiction to review the decision of the Supreme Court of Kansas when that decision rests upon adequate state grounds.

The basis of the Kansas Supreme Court's decision as previously noted was twofold; the first was that full faith and credit need not be applied to the Indiana decision (A 10) and the second that the statutes upon which both appellants relied in their Petition For Probate of Will Probated Elsewhere (K. S. A. 59-2229 and 59-2230) applied only to foreign wills, the wills of nonresident decedents, and not to the wills of resident decedents (A 15). The second holding or decision is a state ground or nonfederal ground.

It is well established that this court will not review a decision of a state court resting upon adequate and independent nonfederal ground. ***Bell v. Maryland,*** 378 U. S. 226, 12 L. Ed. 2d 822, 84 S. Ct. 1814 (1964); ***Smith v. Smith,*** 366 U. S. 210, 6 L. Ed. 2d 233, 81 S. Ct. 1050 (1961); ***Radio Station WOW, Inc. v. Johnson,*** 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475, 32A Am. Jur. 2d 167, Sec. 670 (1945). It is granted that the statutes in question are procedural and not substantive in nature but an adequate state ground may be based upon procedural grounds as well as substan-

tive. Annotation, Adequate State Ground, 24 L. Ed. 2d 837, 840. The second question before the Kansas Supreme Court was whether the statutes in question, K. S. A. 59-2229 and 59-2230, applied to the wills of residents of Kansas or only to the will of nonresidents, foreign wills. The Kansas Court held the latter. This second decision involved the interpretation of two Kansas statutes and did not involve a federal question. A state's highest court is the final judicial arbiter of the meaning of state statutes, *Gurley v. Rhoden*, 421 U. S. 200, 44 L. Ed. 2d 110, 95 S. Ct. 1605 (1975); *Alabama v. King & Boozer*, 314 U. S. at 9-10, 86 L. Ed. 3, 62 S. Ct. 43, 140 A. L. R. 615 (1941). The decision of the state court did not preclude the offering of the document dated June 1, 1973, as a will of a resident decedent. In fact, appellants had already petitioned the Kansas courts for probate of the document as the will of a resident decedent. The Kansas Supreme Court's decision in Reed II held only that the statutes upon which appellants based their second petition applied to the wills of nonresident decedents. Thus there was no attempt on the part of the Kansas Supreme Court to prohibit appellants from offering the document to probate in Kansas but only a decision that they could not do so under the two statutes upon which they were relying. Appellants have been deprived of no basic constitutional right. Kansas has jurisdiction of the proceeding for the probate of the wills of her citizens and the Kansas legislature has the duty to pass laws to implement the probate procedure. The Supreme Court of Kansas has the duty and exclusive jurisdiction to interpret those laws. So long as appellants were not denied the right to petition the courts of Kansas for admission of the document dated June 1, 1973, to pro-

bate in Kansas, they have been denied no federally protected right. The appellants did petition directly for such probate which was denied on valid grounds and appellants did not appeal that decision referred to herein as Reed I.

It is submitted that the decision of the Supreme Court of Kansas was based on adequate state ground completely independent of the federal question of full faith and credit.

QUESTION III. Whether this court has jurisdiction to consider whether K.S.A. 59-2229 and 59-2230 are repugnant to the United States Constitution under the existing facts and circumstances.

It is not clear from a reading of appellants' Jurisdictional Statement as to whether or not they now question the constitutionality of K. S. A. 59-2229 and 59-2230. If they are, this is the first time and place they have done so. They originally petitioned the District Court of Lyon County, Kansas, for probate of will probated elsewhere based upon and pursuant to either or both of those statutes (A 33, 35, 22, 23). At no time did they raise the question of constitutionality before the Supreme Court of Kansas. If appellants are challenging these statutes as unconstitutional under the federal constitution the issue must have been presented to the Supreme Court of Kansas before the issue may be raised in this court. *McGoldrick v. Compagnie Generale Transatlantique,* 309 U. S. 430, 84 L. Ed. 849, 60 S. Ct. 670 (1940). If this is not done, and it was not, there is no federal question concerning the constitutionality of the statutes.

CONCLUSION

The decision of the Kansas Supreme Court on the question of full faith and credit is in full accord with previous decisions of this court and no substantial federal question is presented by the appeal of appellants.

The Kansas Supreme Court's decision regarding K. S. A. 59-2229 and 59-2230 involves only the interpretation of two procedural statutes and no federal question was presented in the interpretation nor is one presented as a result of the interpretation. This decision is based solely on a state ground and is sufficient to dispose of the case thus precluding review by this court.

The question, if any, as to whether K. S. A. 59-2229 and 59-2230 are repugnant to the Constitution of the United States, having never been presented to the Kansas Supreme Court, may not now be considered.

Appellees respectfully move this court to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of Kansas.

Respectfully submitted,

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